

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED
OFFICE

Civil Action No.: 04-10497-NMG

DAVID DEITZEL
Plaintiff,
vs.
BOSTON AND MAINE CORPORATION and
GUILFORD TRANSPORTATION
INDUSTRIES, INC.
Defendants .

U.S. DISTRICT COURT
DISTRICT OF MASS

MOTION TO REMOVE DEFAULT
AGAINST THE DEFENDANTS, BOSTON & MAINE CORPORATION
AND GUILFORD TRANSPORTATION INDUSTRIES, INC.

Now come the defendants in the above entitled matter and respectfully request this Court to allow this Motion to Remove the Defaults entered against Boston & Maine Corporation and Guilford Transportation Industries, Inc. on September 29, 2004. In support of this motion the defendants state that the plaintiff filed a Complaint in Civil Action No. 03-12560-RSG date 12/19/03 which involves the identical incident described in the Complaint to this cause of action. Inasmuch as the parties have been and continue to pursue and defend their respective claims and defenses before Judge Stearns, the defendants respectfully request that this Court Order the removal of the Defaults entered on September 29, 2004. In the event this Court rules favorably on this motion, defendants respectfully request further that this Court dismiss Civil Action No. 04-10497-NMG for the reasons set forth below.

In further support of this motion, the defendants state the following:

1. On or about December 19, 2003, plaintiff, through counsel from the same law office, filed a complaint which was assigned C. A. No. 03-12560-RGS. An Answer was filed and Judge Stearns held a scheduling conference on May 24, 2004 at which counsel for all parties was present.

2. On September 30, 2004, defense counsel received by fax from the defendants in this matter, two (2) Notices of Default in Federal District Court Civil Action No. 04-10497-NMG dated September 29, 2004. Defendants understand the Court allowed these Defaults "upon application of the plaintiff . . . "

3. On September 30, 2004, defense counsel telephoned Atty. Rudolph V. De George, II and then Atty. Rosenthal, as required by Local Rule 7.1 (A)(2) but was advised that neither of them was unavailable. A voice mail was left by defense counsel requesting plaintiff's counsel return his call. No return call was received.

4. On September 30, 2004, defense counsel sent a twelve (12) page fax (see Exhibit A) to plaintiff's counsel pursuant to Local Rule 7.1(A)(2) attaching the following:

- 9/30/4 letter from O'Brien to De George (2 pages);
- 4/15/4 letter from O'Brien to Bozza and Lafferty (2 pages);
- 4/21/4 letter from Paralegal Cook to O'Brien (1 page);
- 5/18/4 letter from O'Brien to De George (1 page);
- 5/19/4 letter from O'Brien to Rosenthal (1 page);
- 6/9/4 email from Federal District Court (1page);

5. The original lawsuit, Civil Action No. 03-12560-RGS, filed by the plaintiff contained issues concerning ownership of the Nashua, New Hampshire rail yard that were addressed in the April 15, 2004 letter to Attys. Bozza and Lafferty from defense counsel, O'Brien. The April 21, 2004, fax from paralegal, Debra A. Cook, confirmed that the deposition of a Guilford Transportation Industries' executive was scheduled for May 11, 2004 which was within the time parameters set by Judge Stearns in his March 18, 2004 Order. On May 10th, plaintiff's counsel cancelled the deposition and informed defense counsel that the plaintiff did not intend to depose Guilford. This was confirmed by letter dated May 18, 2004 from O'Brien to De George.

6. On May 19, 2004, Atty. Rosenfeld telephoned O'Brien concerning a second complaint filed against Boston & Maine Corporation. As a consequence of that conversation, an agreement was reached whereby Atty. Rosenfeld agreed to prepare a Stipulation of Dismissal as to B&M without prejudice as set forth in O'Brien's letter dated May 19, 2004 to Atty. Rosenthal. Atty. O'Brien was never sent a copy of the "second complaint" presumably because plaintiff's counsel agreed to dismiss that action. A Stipulation of Dismissal was never received by defense counsel as to B&M from plaintiff's counsel.

7. Atty. Rosenthal did not do what he said he was going to do.

8. On June 9, 2004, defense counsel received electronic notification by email confirming the representation made by plaintiff's counsel to Judge Stearns at the May 24, 2004 Scheduling Conference that Guilford Rail Systems was no longer a party to the lawsuit.

9. As a consequence, the only defendant in Judge Stearns' Court as of May 24, 2004 was Springfield Terminal Railway Company.

10. Defense counsel certifies that he attempted in good faith to resolve or narrow the issues contained herein with plaintiff's counsel as required by Local Rule 7.1 (A)(2).

Wherefore, inasmuch as defense counsel reasonably relied upon the May 19, 2004 verbal representations of Atty. Rosenthal to the effect that he would file a Stipulation of Dismissal as to B&M Corporation and inasmuch as plaintiff's counsel previously informed Judge Stearns that Guilford was no longer a party to the litigation, defendants respectfully request that this Court allow defendants' Motion to Remove Default. Defendants further respectfully request that this Court dismiss Civil Action No. 03-12560-NMG on the grounds that the cause of action

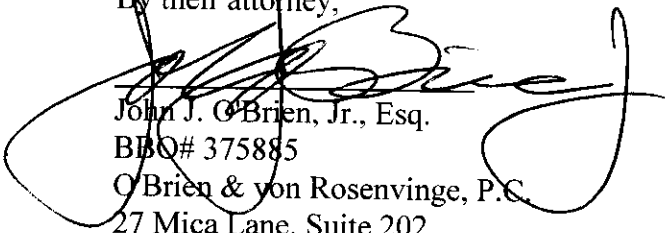
circumvents the earlier rulings issued by Judge Stearns and is duplicative of the claims filed by the plaintiff in Civil Action No. 03-12560-RGS. In further support of the foregoing, defendants submit that it would be unfairly and unduly prejudiced if the Default entered by this Court was not removed.

DEFENDANTS REQUEST A HEARING ON ALL THESE MATTERS.

Respectfully submitted:

The defendants,
Boston & Maine Corporation and Guilford
Transportation Industries, Inc.

By their attorney,



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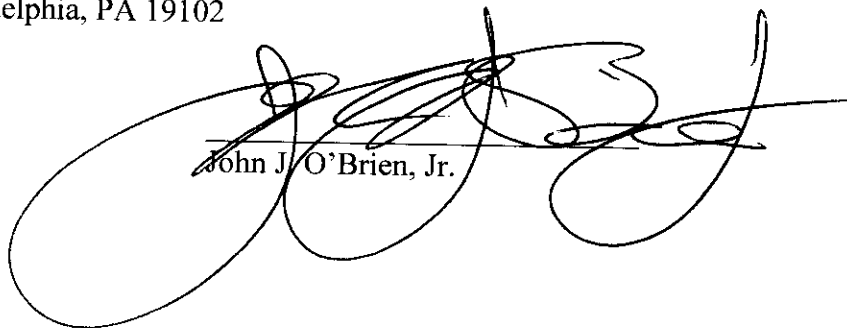
DATED: 10-14-04

CERTIFICATE OF SERVICE

I, John J. O'Brien, Jr., attorney for the defendantS, hereby certify that on this day I forwarded a true copy of the Defendants' Motion to Remove Default by first class mail, postage pre-paid, to the following counsel of record:

Ronald M. Davids, Esq.
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wellesley, MA 02481
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John J. O'Brien, Jr.